PUBLIC PROSECUTOR

v.

MURUGAN SUBRAMANIAM & ORS.

HIGH COURT MALAYA, MELAKA
TUAN AUGUSTINE PAUL SINNAPPEN JC
[CRIMINAL APPEAL NO: 41-33 OF 1995]
10 AUGUST 1996

CRIMINAL LAW: *Committing house-trespass after having made preparation for causing hurt – Section 452 Penal Code – Ingredients – Whether there must be proof of preparation to cause hurt – Causing of hurt after act of trespass – Whether sufficient to prove offence.*

CRIMINAL PROCEDURE: *Joint-charges – Offence under s. 452 Penal Code – Non-incorporation of s. 34 in charges – Whether fatal when prosecution unable to prove which of the several participants committed the alleged offence.*

In the Magistrate's Court, the respondents were jointly charged under s. 452 Penal Code for committing house-trespass after having made preparation to cause hurt. The prosecution did not deem it necessary to cite s. 34 of the Code in the charges and so the charges, as preferred, did not make any reference to that section. The prosecution had not adduced any evidence as to any prior preparation (to cause hurt) but had put in evidence which showed that, upon trespassing unto the house, the respondents were engaged in a fight with the occupants thereof in which they injured SP2 and SP3 by using knives and a cangkul. The prosecution, however, had not been able to identify the actual persons who caused the injury, and this being the case, the respondents argued that the prosecution had not proved its case bearing in mind the non-incorporation of s. 34 aforesaid. The learned Magistrate, having apparently adopted the argument, ruled that the failure to incorporate s. 34 in the circumstances was fatal, and so acquitted and discharged the respondents without calling for their defence. The Public Prosecutor appealed and before the learned Judicial Commissioner the primary questions that arose were:

(i) whether on the facts the learned Magistrate was right in ruling that there was no case to answer.

(ii) whether, even if she was, she was wrong in acquitting the respondents and not invoking s. 173(h) Criminal Procedure Code to amend the charges to one under s. 448 Penal Code.

Held:

[1] Under s. 452 Penal Code the ingredients that require proof by the prosecution are (i) that the respondents committed house-trespass and (ii) that it was committed after making preparation for causing hurt.

[2] Under the definition section (i.e. s. 442 Penal Code), house trespass consists in "entering into or remaining in" any building, tent or vessel. This being the case, on the facts, the first ingredient of the offence had been fulfilled. There was clear evidence that the respondents had entered the premises in question.

[3] In so far as the second ingredient is concerned, what requires proof is the preparation of causing hurt and not the causing of hurt itself, though it may, in certain circumstances, provide evidence of the preparation. In the instant case, the evidence, as adduced, only discloses that after having committed house-trespass the respondents caused injury to SP2 and SP3. This fact, by itself, is insufficient to satisfy the requirements of the second ingredient.

[4] In summary trials, where the defence will have no indication of the evidence that the prosecution is going to rely on, it is necessary to specifically incorporate s. 34 of the Penal Code in the charge if it is desired to invoke the provisions of that section. This is imperative to avoid prejudice and in order to give sufficient particulars of the charge of the defence as required by s. 153 Criminal Procedure Code. Failure to specify it will result in a miscarriage of justice as it will inevitably affect the course of cross-examination of the defence because what has to be proved in a joint charge and in a charge involving two or more persons with common intention is different. Further, such an error cannot be cured by s. 422 Criminal Procedure Code.

[5] Although the charges as preferred against the respondents cannot stand, there is clear evidence that the respondents had committed house-trespass which is sufficient to constitute an offence on its own under s. 448 Penal Code. In the circumstances, the learned Magistrate ought to have considered the provisions of s. 173(h) CPC, and accordingly amended the charges. The learned Magistrate had clearly erred in not exercising the statutory duty imposed on her by the said s. 173(h).

[Appeal partially allowed. Order of learned Magistrate set aside and Magistrate directed to amend charges to one under s. 448 Penal Code read with s. 34 thereof]

Cases referred to:
Choo Chang Teik & Anor. v. PP 3 MLJ 423 ***(refd)***
Lim Baba v. PP [1962] MLJ 20 ***(dist)***
Osman bin Abdullah v. PP [1958] MLJ 12 ***(refd)***

Waryam Singh v. The Crown LLR 22 Loh 432 ***(refd)***
Bishuwanath v. Emperor AIR [1946] All 153 ***(refd)***
Tan Chin Keng v. PP [1964] MLJ 316 ***(refd)***
Tan Cheng Kooi & Anor. v. PP [1972] 2 MLJ 115 ***(refd)***
Santa Singh v. PP [1938] MLJ 58 CA ***(refd)***
Mahbub Shah v. King Emperor LR 72 1A 148 ***(refd)***
Pirmohammed Kukaji v. State of Madhya Pradesh AIR [1960] MP 4 ***(foll)***
PP v. Lee Pak [1937] MLJ 265 ***(refd)***
PP v. Ishak & Ors. [1952] MLJ 216 ***(refd)***
R v. Cheah Teow Peng [1952] MLJ 216 ***(cit)***
PP v. Heng You Nong [1949] MLJ 285 ***(cit)***
PP v. H Parnaby [1953] MLJ 163 ***(cit)***
PP v. Beh Yew Suan [1952] MLJ 225 ***(cit)***
PP v. James Tan [1983] 2 MLJ 173 ***(cit)***
PP v. Tan Khee Wan Iris [1994] 3 SLR 214 ***(refd)***

Legislation referred to:
Penal Code, ss. 34, 366, 452, 448
Criminal Procedure Code, ss. 152, 153, 154, 158, 173(h), 422

Other sources referred to:
Penal Law of India, Dr Sir Hari Singh Gour's, 10th Edn., Vol. 4, p. 3825

For the respondent - Karpal Singh; M/s. Karpal Singh & Co
For the appellant - Anselm Fernandez, DPP

JUDGMENT

Augustine Paul Sinnappen JC:

This is an appeal by the Public Prosecutor against the acquittal and discharge of the three respondents at the close of the case for the prosecution by the learned Magistrate, Magistrate's Court, Melaka on the following charges preferred against them:

First Charge

Bahawa kamu bersama-sama dan yang lain masih bebas pada 9 Ogos 1988 jam lebih kurang 3.05 pagi di rumah tidak bernombor Bukit Nibong, Bukit Lintang, Tiang Dua di dalam Daerah Melaka Tengah di dalam Negeri Melaka telah melakukan pencerobohan rumah setelah membuat persiapan bagi menyebabkan kecederaan kepada M. Periasamy a/l Muniandy KP: 7085505 oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah s. 452 Kanun Keseksaan.

Second Charge

Bahawa kamu bersama-sama dan yang lain masih bebas pada 9 Ogos 1988 jam lebih kurang 3.05 pagi di rumah tidak bernombor Bukit Nibong, Bukit Lintang, Tiang Dua di dalam Daerah Melaka Tengah di dalam Negeri Melaka telah melakukan pencerobohan rumah setelah membuat persiapan bagi menyebabkan kecederaan kepada M. Balasubramaniam a/l Muniandy KP: A 0313950 oleh yang

demikian kamu telah melakukan kesalahan yang boleh di hukum di bawah s. 452 Kanun Keseksaan.

When the charges were read and explained to the respondents in the Magistrate's Court, they had claimed trial. The prosecution called a total of ten witnesses in support of its case. Briefly stated, the background of the case is anchored on a family squabble. The first respondent's wife (SP4) had returned to her parents' home with her infant son, aged four, after a quarrel with her husband. This was done without his consent. On 9 August 1988 the first respondent went to the house of his father-in-law (SP1) together with a group of persons armed with knives. SP1 and the other members of his family who were present in the house at that time refused to open the door upon being asked to do so by the first respondent and the other persons with him. The group then broke open the front door using a cangkul and entered the house. There was a tussle between SP1 and members of his family on one side and the first respondent and his group on the other side. SP1 and two of his sons, SP2 (Balasubramaniam a/l Muniandy) and SP3 (Periasamy a/l Muniandy), were injured in the commotion. According to SP10, a private medical practitioner in Seremban, the injuries sustained by SP2 and SP3 were not serious. After the incident the first respondent removed his son from the house. SP1, SP2, SP3 and SP4 were able to identify the three respondents as persons who had entered into their house on that day but they were unable to identify the persons who had actually caused the injuries.

In his submission at the close of the case for the prosecution learned Counsel for the respondents contended that there was no evidence to identify the persons who had actually caused the injuries to SP2 and SP3. As such, he said, the prosecution had failed to prove its case. He then added that as s. 34 of the Penal Code had not been incorporated into the charges the prosecution case is, in consequence thereof, defective. The prosecuting officer, in his submission, did not address the Court on these issues. The learned Magistrate then acquitted and discharged the respondents without calling upon them to enter their defence for the following reasons:

(i) there was no evidence on the identity of the persons who had caused injury to SP2 and SP3;

(ii) the weapons used by the respondents, that is to say, the cangkul and knives, were not tendered as exhibits;

(iii) the medical evidence on the injuries sustained by SP2 and SP3 was not conclusive; and

(iv) the failure to incorporate s. 34 of the Penal Code is a material defect.

Section 452 of the Penal Code, under which the respondents had been charged, reads as follows:

> Whoever commits house-trespass, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt or of assault, or of wrongful restraint, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Under the section the ingredients that require proof by the prosecution on the facts of this case are:

(i) that the respondents committed house-trespass and

(ii) that it was committed after making preparation for causing hurt.

With regard to the first ingredient the definition of the phrase "house-trespass" can be found in s. 442 of the Penal Code which reads as follows:

> Whoever commits criminal trespass by entering into or remaining in any building, tent, or vessel used as human dwelling or any building used as a place of worship, or a place for the custody of property, is said to commit 'house-trespass'.
>
> Explanation – The introduction of any part of the criminal trespasser's body is entering sufficient to constitute house-trespass.

Under the definition section house-trespass consists in "entering into or remaining in" any building, tent or vessel. Now the term "entering into" is susceptible to some ambiguous interpretation and consequently it is provided in the explanation that "the introduction of any part of the criminal trespasser's body is entering sufficient to constitute house-trespass." If, therefore, the trespasser merely puts in his head or a hand or a leg or any part of his trunk inside a building, his entry is complete to constitute house-trespass, whatever other offence he may then also be guilty of. But if no part of his body enters into the building, there is no house-trespass though the act may amount to an attempt (see Dr Sir Hari Singh Gour's *Penal Law of India* 10th Edn. Vol. 4 p. 3825). Neither the learned Counsel for the respondents in his submission nor the learned Magistrate in her grounds of judgment had any doubt as to proof of this ingredient as there was evidence that the respondents had entered into the premises. It therefore warrants no further consideration by me.

With regard to the second ingredient it was contended by the defence in the Court below that the lack of evidence on the identity of the persons who caused the injury to SP2 and SP3 was fatal to the prosecution case as the respondents had been jointly charged. I shall advert to the correctness of this part of learned Counsel's submission in a later part of the judgment. Be that as it may, I would agree with the general proposition of law contained in it as it is settled law that the onus on the prosecution in a joint charge against two or more persons is to prove the ingredients against each of them separately. In this respect useful reference may be made to *Choo Chang*

Teik & Anor. v. PP [1991] 3 MLJ 423 where Mohamed Yusoff SCJ in delivering the judgment of the Supreme Court said at p. 426 –

> The onus of proving a criminal charge against both appellants in a joint trial lies with the prosecution. In *R v. Abbott* [1955] 2 All ER 899, it was held that: "If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case. If in the circumstances, it were left to the defendants to get out of it if they could, that would put the onus on the defendants to prove themselves not guilty".

Where the prosecution evidence does not disclose positive evidence against all the persons who had been charged jointly then the case could be said to have been proved only if it had been established that the accused persons acted with a common intention as defined in s. 34 of the Penal Code which reads as follows:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

It was the contention of learned Counsel in the Court below and before me that s. 34 must be expressly specified in the charge. In his submission before me the learned Deputy Public Prosecutor argued that it was not necessary to do so. In support he referred to *Lim Baba v. PP* [1962] MLJ 20 where Ismail Khan J (as he then was) said at p. 202:

> It was objected that the charge was defective in that no reference was made to s. 34 of the Penal Code. In my view the charge was correctly framed.

In my opinion the passage just referred to and relied on by the learned Deputy must be read with extreme caution. It is not an authority for what it purports to project. In that case the appellant had been charged with another person still at large for an offence under s. 366 of the Penal Code. As the learned Judge said at p. 202 there was evidence to show that both the appellant and his companion had removed the complainant in a car and that shortly afterwards they both had sexual intercourse with her. As there was sufficient evidence against the appellant the need to rely on s. 34 did not arise. It was perhaps for that reason that the learned Judge said that the charge was correctly framed. In the premises the *Lim Baba* decision is no authority for the proposition relied on by the learned Deputy.

The Court of Appeal in *Osman bin Abdullah v. PP* [1958] MLJ 12 was also confronted with the question of whether a charge is defective because it was not framed with specific reference to s. 34. In answer to the problem posed Thomson CJ (as he then was) said at pp. 15-16:

With regard to the complaint that in the circumstances of the present case the charge was defective because it was not framed with specific reference to s. 34 of the Penal Code, it is to be observed that on this question the Courts in India are not in agreement.

In the Lahore case of *Waryam Singh v. The Crown* LLR 22 Lah 4320 it was held that s. 34 does (not) create any offence and accordingly it is not necessary to specify it in the charge in a case where it is relied on. The section is merely explanatory and embodies in the Code the ordinary common sense principle that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually. On the other hand in the Allahabad case of *Bishuwanath v. Emperor* AIR [1946] All 153 it was held that where the prosecution invokes the aid of s. 34 for holding one person responsible for the result produced by the act of another it is necessary to frame a charge under that section, and that the omission to do so is a vital defect resulting in this that the accused can be held responsible only for the result of an act committed by himself.

It is difficult to ascertain the *ratio decidendi* of these two cases but it does not seem necessary to go further than a consideration of ss. 152, 153 and 154 of the Criminal Procedure Code. Section 152 provides, *inter alia*, that every charge shall state the offence with which the accused is charged and shall mention the law and section of the law against which the offence is said to have been committed. Section 153 provides that the charge shall contain such particulars as to the time and place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged.

Section 154 reads as follows –

When the nature of the case is such that the particulars mentioned in the last two preceding sections do not give the accused sufficient notice of the matter with which he is charged the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

We do not find it necessary to lay down any general rule as to whether, when the prosecution proposed to invoke the provision of s. 34, it is necessary to specify that section of the Code in terms. On grounds of common fairness, however, where the prosecution are proposing to invoke the section the charge should make this clear to the accused. In a case of murder, for example, the interests of justice clearly require that the accused person should know whether the case against him is that he himself struck the fatal blow or whether it is that some other person struck the fatal blow but that he was acting at the time together with that other person and that the fatal blow was struck in furtherance of an intention which was common to them both. If this be not made clear it seems to us that the particulars stated in the charge do not give the accused sufficient notice of the matter with which he is charged.

Having ruled that the charge was detective in that case the Court of Appeal applied, *inter alia*, s. 422 of the Criminal Procedure Code and held that the error had not occasioned a failure of justice. The Court proceeded on that basis as it found that the appellant was not prejudiced as the evidence adduced at the trial did not depart in any material respect from the evidence given at the preliminary inquiry. In the circumstances, it was held that the appellant had sufficient notice of the matter with which he was charged. In *Tan Chin Keng v. PP* [1964] MLJ 316 Ismail Khan J (as he then was) referred to the *Osman bin Abdullah* decision and said at pp. 317-8:

> There is nothing in the charge to indicate to the appellant with sufficient clarity that what the prosecution proposed to establish against him was not that he demanded any money from, or threatened the complainant with injury, but that he, the 1st accused and the others still at large were acting together with a common intention to put the complainant in fear of injury with a view to committing extortion and that in furtherance of an intention common to all of them the complainant was put in such fear. For these reasons, I am satisfied that the charge offended against the principle set out in the above case. It is true that in that case the failure to frame the charge with specific reference to s. 34 of the Penal Code was held to have occasioned no failure of justice. That case can be distinguished as it was tried in the High Court where the appellant was represented by Counsel who had the advantage of studying the deposition in the case and where the evidence given by the prosecution witnesses did not differ materially from that given at the preliminary enquiry. As His Lordship observed, it is clear that from the beginning in spite of the error of the charge, he (the accused) knew perfectly well what the case for the prosecution was going to be and what in fact it was.

The *Tan Chin Keng* decision was referred to by Chang Min Tat J (as he then was) in *Tan Cheng Kooi Anor. v. PP* [1972] 2 MLJ 115 where he said at p. 117:

> ... where the prosecution is not sure and unable to prove which of the several participants in the action constituting the offence committed the act, as eg, where it is uncertain or impossible to say which of the several persons attacking a person struck the fatal blow which led to all of them appearing on a murder charge, then the prosecution must rely on common intention and must charge all the accused with murder read with s. 34 – see, *inter alia, Santa Singh v. Public Prosecutor* [1938] MLJ 58, CA and *Mahbub Shah v. King Emperor* LR 72 1A 148. In *Tan Chin Keng v. Public Prosecutor* [1964] MLJ 316 Ismail Khan J (as he then was) held that where the prosecution was relying on common intention, the failure to frame the charge as one read together with s. 34 of the Penal Code meant that it had not indicated with sufficient clarify what the prosecution case was. But where several persons committed the offence, and the prosecution could establish this in evidence, then for myself I cannot see the necessity for relying on common intention. If as in this case, both the appellants had threatened the complainant with injuries for the purpose of committing extortion, they would, in my view, be properly charged if charged jointly.

I must add that the apparent injunction placed by the learned Judge in the last sentence of the above passage does not in any way affect what precedes it. If two or more persons had been charged jointly and there is evidence against them with respect to all the ingredients then the need to activate s. 34 does not arise.

The trilogy of cases that I have adverted to make the contention of the learned Deputy unsustainable. Accordingly, in summary trials where the defence will have no indication of the evidence that the prosecution is going to rely on it is necessary to specifically incorporate s. 34 of the Penal Code in the charge if it is desired to invoke the provisions of that section. This is imperative to avoid prejudice and in order to give sufficient particulars of the charge to the defence as required by s. 153 of the Criminal Procedure Code. Failure to specify it will result in a miscarriage of justice as it will inevitably affect the course of cross-examination of the defence because what has to be proved in a joint charge and in a charge involving two or more persons with common intention is different. In the circumstances such an error cannot be cured by s. 422 of the Criminal Procedure Code.

Notwithstanding what I have said thus far the case against the respondents suffers from another flaw. This is with regard to the second ingredient of each charge, that is to say, that the house-trespass was committed after making preparation for causing hurt. As far as this ingredient is concerned the evidence adduced only discloses that after having committed house-trespass the persons caused injury to SP2 and SP3. That fact on its own is insufficient to satisfy the requirements of the second ingredient. In this regard Dr Sir Hari Singh Gour in his book entitled *Penal Law of India* 10th Edn., Vol. 4 says at p. 3856 –

> For a conviction under s. 452, IPC, it is necessary to prove that the dominant intent of the accused was to cause hurt to ... any person.

And at p. 3857 –

> But since the criminality under this section depends upon preparation, there must be clear evidence of it.

In *Pirmohammed Kukaji v. State of Madhya Pradesh* AIR [1960] MP 4 the evidence showed that the accused and his companions went armed to the complainant's house for the purpose of forcibly taking her away. The complainant was the wife of the accused. It was held that fact is not sufficient to support a conviction under s. 452 which requires that the house-trespass should have been committed in order to cause hurt to or to assault or to wrongfully restrain any person after having made preparation for that purpose. No doubt, by going armed the accused intended to intimidate the inmates of the house and thus facilitate his object of taking away his wife with him. But the fact that he had the intention to intimidate his wife and her mother, or

that he caused the hurt in forcibly carrying her away does not mean that he went to the house of her father for the purpose of causing hurt or assaulting or wrongfully restraining any inmate of the house. The evidence adduced in this appeal on the second ingredient in each of the two charges is confined to that parameter only. Accordingly it is my view that this ingredient had not been proved by the prosecution. To that extent the submission of learned Counsel, to which I said I would return, is without any foundation. What requires proof is the preparation to cause hurt and not the causing of the hurt itself though it may, in certain circumstances, provide evidence of the preparation. In the premises, the charges preferred against the respondents cannot stand.

However, there is clear evidence that the respondents had committed house-trespass which is sufficient to constitute an offence on its own under s. 448 of the Penal Code which reads as follows –

> Whoever commits house-trespass shall be punished with imprisonment for a term which may extend to one year, or with fine, which may extend to two thousand ringgit, or with both.

In the circumstances the learned Magistrate ought to have considered the provisions of s. 173(h) of the Criminal Procedure Code which reads as follows –

> If, when such evidence has been taken, the Court is of opinion that there are grounds for presuming that the accused has committed the offence charged or some other offence which such Court is competent to try and which in its opinion it ought to try, it shall consider the charge recorded against the accused and decide whether it is sufficient and if necessary, shall amend the same.

The duty of the Court is to consider the charge recorded against the accused and decide whether it is sufficient and, if necessary, to amend the same. Although the duty of the Court under this subsection does not arise until the prosecution case is concluded as stated therein it does not mean that the charge cannot be amended at an earlier stage under s. 158 of the Criminal Procedure Code (see *PP v. Lee Pak* [1937] MLJ 265). The position therefore is that a Court has the discretion to amend the charge at any stage of the trial but, in addition, it is statutorily required by s. 173(h) to consider if any amendment is necessary at the close of the prosecution case. An omission to do this will in certain circumstances constitute a proper ground for reversing the Court's decision. However, the main obligation is on the prosecution to suggest any possible amendments to the charge. It is not incumbent on the Court to search the law for offences which an accused person may have committed (see *PP v. Ishak & Ors.* [1952] MLJ 151; *R v. Cheah Teow Peng* [1952] MLJ 216; *PP v. Heng You Nong* [1949] MLJ 285 and *PP v. H Parnaby* [1953] MLJ 163). Where the attention of the trial Court has been directed, no matter how, to a relevant law or to an amendment, it then

becomes the duty of the Court to consider in appropriate circumstances whether its powers under this subsection should be exercised (see *PP v. Beh Yew Suan* [1952] MLJ 225). Where the facts do not establish a case against the accused person on the charge preferred against him but disclose another offence for which he is not charged the Court ought to amend the charge unless it has a good reason not to do so (see *PP v. James Tan* [1983] 2 MLJ 173 and *PP v. Tan Khee Wan Iris* [1994] 3 SLR 214).

As I said in an earlier part of the judgment the first ingredient under s. 452 of the Penal Code which constitutes an offence on its own has been proved by the prosecution. The learned Magistrate therefore ought to have amended the charge herself without the need for any prompting from the prosecution. In my opinion the learned Magistrate had erred in not exercising the statutory duty imposed on her by s. 173 (h) of the Criminal Procedure Code.

In the upshot I set aside the order of the learned Magistrate and directed her to amend the charges to one under s. 448 of the Penal Code read with s. 34 of the same code and to call for the defence after having complied with the relevant requirements of the Criminal Procedure Code following an amendment to a charge.

Reported by W.A. Sharif